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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1428

THE FORD MOTOR COMPANY,
Petitioner,

vs.

THOMAS POLK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States

OPINIONS BELOW

The United States District Court for the Western District of Missouri, Western Division, rendered no opinion. The panel opinion of the United States Court of Appeals for the Eighth Circuit is unreported, but is appended to the Petition for a Writ of Certiorari. This opinion was filed on October 30, 1974, Nos. 73-1255 and 73-1256. Appellees' Petition for Rehearing En Banc was granted on November 22, 1974.

The opinion of the United States Court of Appeals for the Eighth Circuit on rehearing en banc is reported at 529 F.2d 259. The Second Petition for Rehearing En Banc was denied on February 19, 1976.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

STATE CONSTITUTIONAL PROVISION AND RULE OF COURT INVOLVED

Article I, Section 22(a), Constitution of The State of Missouri.

Right of trial by jury—qualifications of jurors—two-thirds verdicts.

That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the

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> trial of criminal and civil cases in courts not of record may consist of less than 12 citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.

Rule 20.R.1., Rules of the United States District Court for the Western District of Missouri.

> Unless otherwise specially ordered by the court in a designated civil action or consolidated actions, the juries shall consist of six members in all civil cases, including but not limited to complex cases.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

QUESTION PRESENTED

Is the District Court sitting in a diversity case required to empanel a jury of twelve members in derogation of a local court rule limiting juries to six members when the law of the forum state requires a twelve-member jury?

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Federal Courts Which Have Considered the Issue Raised by Petitioner Have All Held That the Erie Doctrine Does Not Require the District Court Sitting in a Diversity Action to Apply the Law of the Forum State Pertaining to the Size of the Jury.

The sole reason given by the Petitioner in support of its request that the Court grant a Writ of Certiorari is the assertion that the right to a twelve-member jury guaranteed by state law in state proceedings is a *substantive* right which must be recognized and protected in federal diversity proceedings under the holding of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). However, petitioner has failed to cite a single federal case which holds or even implies that state law relating to trial by jury is a *substantive* matter within the meaning of the *Erie* doctrine. In fact, every federal authority considering the subject has ruled to the contrary.

The precise question raised by the petitioner has now been considered by four Circuit Courts of Appeals and each has ruled adversely to petitioner's position. *Polk* v. *Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976); *Palmer* v. *Ford Motor Co.*, 498 F.2d 952 (10th Cir. 1974); *Dashiell* v. *Keauhou-Kona Co.*, 487 F.2d 957 (9th Cir. 1973); *Wilson* v. *Nooter Corp.*, 475 F.2d 497 (1st Cir.), *cert. denied* 414 U.S. 865 (1973). In each of these decisions the Courts held that state practice requiring a twelve-member jury does not mandate a trial by a twelve-member jury in the federal court in a diversity action. In each case the Court considered the argument that the state practice was engrafted upon the federal practice by the *Erie* doctrine,

and in each case the argument was rejected on the grounds that the number of jurors required under state law is a *procedural* matter which need not be followed in a federal diversity action under *Erie*. No contrary decision has been cited to this Court and none appears from respondents' research. Thus, the Petitioner has failed to make any showing that the decision of the Eighth Circuit Court of Appeals conflicts with the decisional law in the other Circuits or that it departs in any way from the usual course of federal proceedings.

II. This Court Has Consistently Held That Matters Pertaining to the Jury Process in the Federal Courts Are Governed by Federal Law Without Regard to State Laws or Practices.

Under the clear pronouncements of this Court, the decision below was manifestly correct. In diversity cases state practice pertaining to trial by jury has long been subjugated to the federal practice. In *Simler* v. *Conner*, 372 U.S. 221 (1963), the Court held that the question of whether an action was legal or equitable and therefore whether a jury trial is to be afforded at all must be determined by reference to federal law without regard to state law. The Court stated:

> We agree with the respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. In diversity cases, of course, the substantive dimensions of the claim asserted finds its

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> source in state law, Erie R. Co. v. Tompkins . . . but the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law.

372 U.S. at 222.

Similarly, in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), the Court, holding that federal law controls the allocation of the fact-finding process between judge and jury stated:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. Herron v. Southern P. Co., 283 U.S. 91, 75 L.Ed. 857, 51 S.Ct. 383. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.
>
> We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy

> against allowing state rules to disrupt the judge-jury relationship in the federal courts.

356 U.S. at 537-8. *See also Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959).

The federal decisions uniformly hold that litigants in federal diversity cases have no Seventh Amendment right to a trial by a jury consisting of twelve persons. *Colgrove* v. *Battin*, 413 U.S. 149 (1973); *Arcieri* v. *Erie Lackawanna Railway Co.*, 484 F.2d 451 (6th Cir. 1973); *Bernard* v. *Omaha Hotel, Inc.*, 482 F.2d 1222 (8th Cir. 1973); *Winsby* v. *John Oster Manufacturing Co.*, 482 F.2d 276 (3d Cir. 1973); *Cooley* v. *Strickland Transportation Co.*, 459 F.2d 779 (5th Cir. 1972). Petitioner has plainly failed to show that the decision of the Eighth Circuit Court of Appeals is contrary to a controlling decision of this Court or any other federal court which has considered the question.

As noted by this Court, a federal court sitting in a diversity case is "only another court of the State" and may not "substantially affect the enforcement of a right as given by the State." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-9 (1945). However, as a matter of federal law, the size of the jury is not outcome-determinative. *See Colgrove* v. *Battin, supra,* at 160 where the Court said:

> We had no difficulty reaching the conclusion in Williams that a jury of six would guarantee an accused the trial by jury secured by Art. III and the Sixth Amendment. Significantly, our determination that there was "no discernible difference between the results reached by the two different-sized juries," 399 US at 101, 26 LE2d 446, drew largely upon the results of studies of the operations of juries of six in civil cases. Since then, much has been written about the six-member jury, but nothing that persuades us

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> to depart from the conclusion reached in Williams. Thus, while we express no view as to whether any number less than six would suffice, we conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases.

See also Williams v. *Florida*, 399 U.S. 78, 100-102 (1970), holding that the Sixth Amendment does not prohibit a six member jury in criminal cases, where this Court stated:

> The purpose of a jury trial, as we noted in Duncan, is to prevent oppression by the government. . . . [W]e find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 —particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact finder hardly seems likely to be a function of size.
>
> * * *
>
> What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.

Indeed, if the outcome of the instant case was affected by the application of state jury practice in the federal court, the outcome was skewed in Petitioner's favor because the Missouri law permits a verdict by nine of the twelve jurors in a civil case, Mo. Const. art I, § 22(a), rather than the unanimous verdict required in the federal court. It is clear under every test that the state practice requiring a twelve-member jury is not a substantive mat-

ter which must be applied in the federal court under the *Erie* doctrine. Every federal court which has considered the question has so ruled.

CONCLUSION

Respondent respectfully submits that petitioner has failed to establish any reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this court; nor has the Court of Appeals decided a federal question in a way which conflicts with the applicable decisions of this court or another Court of Appeals on the same matter. The Court of Appeals correctly held that the size of a jury in a diversity case is a procedural matter which is to be governed by federal law. Therefore, and for the reasons stated above, respondent states that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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